FILED BY CLERK
JULY 10 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARCELO PEREZ MUNGUIA, Appellant.	2 CA-CR 2007-0222 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063245

Honorable Edgar B. Acuña, Judge

AFFIRMED AS MODIFIED

R. Lamar Couser — Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 Appellant Marcelo Perez Munguia was indicted in September 2006 on six felony charges: aggravated assault with a deadly weapon or dangerous instrument; aggravated assault causing serious physical injury; aggravated driving under the influence of

an intoxicant (DUI) while his driver's license was suspended, revoked, or restricted; fleeing from a law enforcement vehicle; resisting arrest; and leaving the scene of an accident involving serious physical injury. The state alleged that the first two counts were both dangerous-nature offenses; that Munguia had three prior felony convictions, one of them for DUI; and that one of his prior convictions was for an offense that was both serious and dangerous. The state also alleged Munguia had committed these offenses while on probation, parole, or other release for two previous offenses.[1]

¶2 The charges against Munguia arose from an incident in August 2006, during which Tucson police officers observed the vehicle Munguia was driving traveling at night with its lights off. They followed, and Munguia attempted to evade them and other officers who eventually joined the pursuit. Ultimately, one officer saw Munguia turn into a "closed-off cul[-]de[-]sac type" residential area with only one point of ingress and egress. To block Munguia's path, the officer angled his patrol car in the middle of the roadway, with its overhead lights flashing and its spotlight on, and waited for Munguia to emerge. The officer soon saw Munguia's vehicle come back out of the neighborhood, approach him, and drive up onto a sidewalk. The officer repeatedly yelled at Munguia to stop and at some point stepped out of his patrol car and drew his weapon. Munguia backed up and drove straight

[1]Because the state cited an incorrect statute in its allegation that Munguia had been on release from custody in Gila County when he committed these offenses, the court ruled the state could use the Gila County conviction as an aggravating factor but not for sentence enhancement.

toward the officer, eventually hitting the officer's leg with his vehicle and inflicting serious injuries.

¶3 At the end of a four-day trial, twelve jurors found Munguia guilty of the dangerous-nature offense of aggravated assault of a law enforcement officer using a motor vehicle, a deadly weapon or dangerous instrument, and fleeing from a law enforcement vehicle. The jury found him not guilty of the other four counts and found the state had not proven that he had been on release from custody on a Gila County offense when he committed these offenses. The court found Munguia had one historical prior felony conviction in Pima County. It sentenced him to an enhanced, slightly aggravated, 12.5-year prison term for aggravated assault and to a concurrent, enhanced, aggravated, three-year term for fleeing from a law enforcement vehicle. It also ordered him to pay restitution to the victim and his insurance carrier in the combined sum of $77,317.71.

¶4 Appellate counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel has substantially complied with the requirements of *State v. Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d 89, 97 (App. 1999), by "setting forth a detailed factual and procedural history of the case with citations to the record, [so that] this court can satisfy itself that counsel has in fact thoroughly reviewed the record." Counsel avows that he has diligently searched the record but been unable to find meritorious issues to raise on appeal. He therefore asks us to search the record for fundamental error. Munguia has not filed a supplemental brief.

¶5 Pursuant to our obligation under *Anders*, we have reviewed the record in its entirety, including the reporter's transcripts from trial and sentencing. We are satisfied that the evidence was sufficient to support both convictions, and we have found no fundamental error. We therefore affirm Munguia's convictions and his sentence for aggravated assault. We note, however, that the sentencing minute entry characterizes the offense of fleeing from a law enforcement vehicle as "nonrepetitive." But, as the court stated when pronouncing sentence, the prison term it imposed is enhanced by a prior felony conviction. *See* A.R.S. § 13-604(A); *see also State v. Leon*, 197 Ariz. 48, n.3, 3 P.3d 968, 969 n.3 (App. 1999) (oral pronouncement of sentence controls when different from written judgment). Accordingly, we modify the sentencing minute entry to classify the offense as "repetitive," *see State v. Jonas*, 164 Ariz. 242, 245 n.1, 792 P.2d 705, 708 n.1 (1990), and affirm the sentence as modified.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge